STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MCGEE,

Plaintiff/Counterdefendant,

v

CITY OF WARREN,

Defendant/Counterplaintiff/Cross-Plaintiff-Appellant,

and

TONY ANTHONY, INC.,

Defendant/Cross-Defendant-Appellee,

and

ANDREW ECKSTEIN, MAJOR CEMENT COMPANY, INC., and ANDERSON, ECKSTEIN & WESTRICK, INC.,

Defendants.

UNPUBLISHED
May 24, 2011

No. 296452
Macomb Circuit Court
LC No. 2008-002139-NO

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

The City of Warren (the City), appeals by right the trial court's order granting summary disposition in favor of Tony Anthony, Inc. (Tony Anthony) with regard to its cross-claims for breach of contract and indemnification. The City argues that the trial court erred by ruling that its cross-claims were barred by the statute of repose, MCL 600.5839. We disagree with the City and therefore affirm.

This appeal arises out of a trip-and-fall on a sidewalk in the City. Plaintiff sued the City and several contractors, including Tony Anthony, who had worked on the sidewalk during a water main replacement project (hereinafter the "Elmer Road Project") between 2002 and 2004.

Summary disposition was granted in favor of the contractors, and the City settled with plaintiff. This appeal concerns the City's cross-complaint against Tony Anthony for indemnification.

The trial court granted summary disposition in favor of Tony Anthony on the ground that the City's cross-claims were barred by the statute of repose, MCL 600.5839(1), which provides:

> No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

"'[T]he purpose of the statute of repose is to shield architects, engineers, and contractors from stale claims and relieve them of open-ended liability for defects in workmanship.'" *Miller-Davis Co v Ahrens Constr*, 285 Mich App 289, 302; 777 NW2d 437 (2009) (citation omitted). The City filed its cross-complaint against Tony Anthony on September 26, 2008. The trial court concluded that the relevant statutory period began to run on or about August 15, 2002, and that the cross-claims were therefore barred.

The City first argues that there remained genuine issues of material fact that should have precluded summary disposition in this case. However, the trial court granted summary disposition under MCR 2.116(C)(7), on the basis of the statute of repose. Accordingly, we need not consider whether there remained genuine issues of fact which would have precluded a grant of summary disposition under MCR 2.116(C)(10).

The City next argues that the trial court incorrectly concluded that MCL 600.5839 applied to the facts of this case because the agreement between the parties specified that acceptance of performance of the contract would not occur until after the entire Elmer Road Project was completed and inspected, which did not occur until at least 2004.

A trial court's decision to grant or deny summary disposition is reviewed de novo. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor unless they are contradicted by other appropriate evidence. *Id*. "If the pleadings demonstrate that one party is entitled to judgment as a matter of law, or if affidavits and other documentary evidence show that there is no genuine issue of material fact concerning the running of the period of limitations, the trial court must render judgment without delay." *Adams v Adams (On Reconsideration)*, 276 Mich

App 704, 720; 742 NW2d 399 (2007). Questions of law, including statutory interpretation, are reviewed de novo. *Kuznar*, 481 Mich at 176.

Tony Anthony does not dispute the City's interpretation of the contract language. It argues, and the trial court agreed, that the period prescribed by MCL 600.5839 begins to run upon acceptance, occupancy *or* use of the improvement, and that the sidewalk in question was in use in August 2002, regardless of the date of final acceptance. The City does not dispute that the portion of the sidewalk in question was being used after August 2002. Instead, it argues that the contract language overcomes the language of the statute at issue.

Construing the language of MCL 600.5839, this Court recently stated that "it is reasonable to construe the word 'use' in the statute as 'use' of the 'improvement' for its intended purpose by any lawfully authorized person or entity." *Miller-Davis*, 285 Mich App at 311. This Court also reiterated that the period of repose found in MCL 600.5839 "'is triggered by the time of occupancy *or* use *or* acceptance[.]'" *Id*. at 309 (emphasis in original; citation omitted).

The City's argument is clearly inconsistent with this Court's decision in *Miller-Davis*. The City insists that the agreement between the parties controls the date of acceptance, and that the parties have therefore "contract[ed] around" MCL 600.5839. But the City does not address or cite *Miller-Davis*. Instead, it cites an unpublished opinion of this Court for the proposition that "contractual undertakings . . . effect application of MCL 600.5839." However, the unpublished opinion at issue—wherein this Court expressly held that occupancy, use or acceptance would cause the period of repose to begin—simply does not support the City's proposition. Moreover, as noted earlier, *Miller-Davis* clearly dictates that the *use* of an improvement will trigger the commencement of the period of repose.

The City also argues that MCL 600.5839 is inapplicable in this case because the work performed on the sidewalk was not an "improvement to real property" within the meaning of the statute. The City contends that the work on the sidewalk did not constitute an "improvement" because the sidewalk slabs were merely removed and replaced. An improvement is "'"a permanent addition to or betterment of real property that enhances its capital value . . . and is designed to make the property more useful or valuable as distinguished from ordinary repairs."'" *Miller-Davis*, 285 Mich App at 302-303 (citations omitted). This Court has repeatedly noted that "'if a component of an improvement is an integral part of the improvement to which it belongs, then the component constitutes an improvement to real property.'" *Id.* at 303, quoting *Travelers Ins Co v Guardian Alarm Co*, 231 Mich App 473, 478; 586 NW2d 760 (1998). In this case, the sidewalk slabs, including the one that caused plaintiff's injury, needed to be removed in order to allow replacement of the water mains, and were subsequently replaced by Tony Anthony. The City asserts that the "restoration of the concrete slabs of sidewalk" did not constitute an improvement to real property because the slabs were merely replaced in their same condition following the construction. But the City fails to address whether the sidewalk construction was a component part of an improvement to real property. Moreover, the City does not dispute that the entire Elmer Road Project—i.e., the replacement of water mains throughout the neighborhood—was an improvement to real property. Because the removal and replacement of sidewalk squares was a necessary and integral component of the work to replace the water mains, we conclude that it constituted "an improvement to real property" within the meaning of MCL 600.5839. See *Miller-Davis*, 285 Mich App at 302-303.

Lastly, the City argues that MCL 600.5839 should not apply to claims for breach of contract. As this Court noted in *Miller-Davis*, 285 Mich App at 307, the language of MCL 600.5839 is "broad and all-inclusive." Indeed, the statute of repose contained in 600.5839 "applies to all actions against a contractor based on an improvement to real property, *including actions based on contract*." *Travelers* 231 Mich App at 481-482 (emphasis added).

The City identifies yet another unpublished opinion of this Court for the proposition that MCL 600.5839 does not apply to breach of contract claims and that the statute's applicability hinges on the "origin and nature of the action." As the City is undoubtedly aware, an unpublished decision of this Court does not constitute binding precedent under the rule of stare decisis. MCR 7.215(C)(1). We reiterate that this Court has already held that the statute of repose contained in 600.5839 applies to breach of contract claims. *Travelers* 231 Mich App at 481-482. Even if we were inclined to consider the unpublished decision for its persuasive value, the facts of this case are clearly distinguishable from those presented in the cited unpublished opinion. "[I]t does not matter that [a] plaintiff's legal theory is based on an express promise when it is a claim for injury (harm or damage) to or caused by an improvement to real property a contractor has made." *Miller-Davis*, 285 Mich App at 308.

The trial court did not err by determining that MCL 600.5839 barred the City's claims or by granting summary disposition in favor of Tony Anthony.

Affirmed. As the prevailing party, appellee Tony Anthony may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly